Office - Supreme Court,
FILED
FEB 13 1952
MORE CRO
CL

IN THE

Supreme Court of the United States

OCTOBER TERM 1951

Nos. 524, 525, 526, 527 and 528

CHEMICAL BANK & TRUST COMPANY, as Trustee under the Indenture dated as of December 1, 1926 securing Missouri Pacific Secured Serial Bonds; ALLEGHANY CORPORATION; MISSOURI PACIFIC RAILROAD COMPANY 5¼% SECURED SERIAL BONDHOLDERS COMMITTEE; JOHN V. FARWELL, III, *et al.*, Independent Directors of the Missouri Pacific Railroad Company; and MISSOURI PACIFIC RAILROAD COMPANY,

Petitioners,

v.

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

CHARLES W. MCCONAUGHY,
MORRIS D. CRAWFORD, JR.,
Attorneys for Group of Institutional Investors Holding First and Refunding Mortgage 5% Bonds of Missouri Pacific Railroad Company.

SANFORD H. E. FREUND,
Attorney for Protective Committee for the Holders of General Mortgage Bonds of Missouri Pacific Railroad Company.

WILLIAM P. PALMER,
PHILIP E. GREGG,
Attorneys for Bankers Trust Company, Successor Trustee under Missouri Pacific Railroad Company Twenty-Year 5½% Convertible Gold Bonds Indenture.

CADWALADER, WICKERSHAM & TAFT,
14 Wall Street,
New York 5, N. Y.
Of Counsel.

SHEARMAN & STERLING & WRIGHT,
20 Exchange Place,
New York 5, N. Y.,
Of Counsel.

[illegible], BALLANTINE, HARLAN,
BUSHBY & PALMER,
31 Nassau Street,
New York 5, N. Y.,
Of Counsel.

[illegible]d: February 15, 1952.

INDEX

PAGE

TABLE OF CITATIONS ii

ABBREVIATIONS USED IN THIS BRIEF v

OPINIONS BELOW 2

JURISDICTION 2

PRELIMINARY STATEMENT 2

A. The Petitioners 3

B. The questions presented by the petitions 4

ARGUMENT 8

POINT I—The contention that proceedings for approval of the Plan are suspended because of the pendency of the Section 208(a)(1) proceedings does not present a question which merits review by this Court 8

POINT II—The findings of the Commission as to maximum permissible capitalization should not be reviewed by this Court 13

1. The contention that the Commission, in making its findings as to earning power, relied on a "depression forecast" and ignored war earnings and recent favorable developments 15

2. The contention that the Commission failed to accord proper weight to improvements 18

3. The contention that reproduction cost was improperly computed 19

POINT III—In considering the petitions this Court should ignore the evidence as to changed conditions which was submitted to the Commission in the Section 208(a)(1) proceedings and to the District Court in the hearings on confirmation.... 22

PAGE

POINT IV—The contention that the consolidation proposed in the Plan is unlawful does not present an important question. No conflict of decisions is presented 24

POINT V—The contention that the Commission unlawfully limited the capitalization of the New Orleans by physical value factors does not present an important question 25

POINT VI—The contentions concerning the provision of the Plan dealing with the selection of the first Board of Directors present no important question 26

POINT VII—The contention that the Commission has made improper use of the cash balances of the debtors presents no important question 28

CONCLUSION 30

APPENDIX A 33

APPENDIX B 34

APPENDIX C 38

Table of Citations

Cases

Allen v. *Trust Company*, 326 U. S. 630 (1946) 13

Callaway v. *Benton*, 336 U. S. 132 (1949) 24

Continental Illinois National Bank & Trust Co. v. *Chicago, Rock Island & Pacific Railway Company*, 294 U. S. 648 (1935) 3

Ecker v. *Western Pacific R. Corp.*, 318 U. S. 448 (1943) 5, 14, 19, 22

Ex parte 175, Increased Freight Rates, 1951, 281 I.C.C. 557 (1951) 20

Faulkner v. *Gibbs*, 338 U. S. 267 (1949) 13

Federal Power Commission v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944) 19

PAGE

Federal Power Commission v. *Pipeline Co.*, 315 U. S. 575 (1942) 19

Florida East Coast Railway Company Reorganization, Sixth Supplemental Report, decided October 25, 1951, I.C.C. Docket No. 13170 21

General Pictures Co. v. *Electric Co.*, 304 U. S. 175 (1938) 13

Group of Institutional Investors v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 318 U. S. 523 (1943) 5, 14, 19, 20, 21

In re Chicago, Rock Island & Pacific Ry. Co., 168 F. 2d 587 (7th Cir., 1948), cert. den. *sub nom. Texas* v. *Brown*, 335 U. S. 855 (1948) 24

In re Florida East Coast Railway Company, 81 F. Supp. 926 (S.D. Fla. 1949), aff'd *sub nom. Atlantic Coast Line R. Co.* v. *St. Joe Paper Co.*, 179 F. 2d 538 (5th Cir., 1950), cert. den. 339 U. S. 929 (1950) 24

In re Missouri Pacific R. Co., 93 F. Supp. 832 (E.D. Mo. 1950) 2

Prior decisions—39 F. Supp. 436 (E.D. Mo. 1941) 6

50 F. Supp. 936 (E.D. Mo. 1943) 4, 6

64 F. Supp. 64 (E.D. Mo. 1945) 6

In re St. Louis-San Francisco Ry. Co., 59 F. Supp. 417 (E.D. Mo. 1945), aff'd *sub nom. Brooks* v. *St. Louis-San Francisco Ry. Co.*, 153 F. 2d 312 (8th Cir., 1946); 68 F. Supp. 921 (E.D. Mo. 1946) 7

In re St. Louis Southwestern Ry. Co., 53 F. Supp. 914 (E.D. Mo. 1944), aff'd, with modification, *sub nom. St. Louis Southwestern Ry. Co.* v. *Henwood*, 157 F. 2d 337 (8th Cir., 1946) cert. den. 330 U. S. 836 (1949) 7

Keystone Mining Co. v. *Gray*, 120 F. 2d 1 (3rd Cir., 1941) 25

Missouri Pacific Railroad Company Reorganization, 275 I.C.C. 59, 203 (1949) 2

Prior reports—239 I.C.C. 7 (1940) 6

257 I.C.C. 479 (1944) 6

PAGE

R.F.C. v. *Denver & R.G.W.R. Co.*, 328 U. S. 495 (1946) 5, 19

Rutland Railroad Company Reorganization, 267 I.C.C. 153 (1947) 21

St. Louis Southwestern Railway Company Securities, 267 I.C.C. 392 (1947) 7

State of Texas v. *Group of Institutional Investors, et al.*, 199 F. 2d 265 (8th Cir., 1951) 2

Timken Roller Bearing Co. v. *U. S.*, 341 U. S. 593 (1951) 15

Tyler v. *Judges of the Court of Registration*, 179 U. S. 405 (1900) 28

United States v. *O'Donnell*, 303 U. S. 501 (1938) 13

Williams Co. v. *Shoe Machinery Corp.*, 316 U. S. 364 (1942) 13

Wright v. *Group of Institutional Investors*, 163 F. 2d 1022 (8th Cir., 1947) 4, 6

Other Authorities

Hale, Robert L. "Utility Regulation In The Light Of The Hope Natural Gas Case", 44 Col. L. Rev. 488 (1944) 19

Moody's Manual of Investments, Railroads, 1951 7

Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States (1951) 13, 28

Senate Report No. 897 accompanying H.R. 2298, 80th Congress, 2nd Session, 1948 9

2 Sutherland, Statutory Construction (3rd ed., 1943) 10

Swaine, Robert, "A Decade of Railroad Reorganization under Section 77 of the Federal Bankruptcy Act", 56 Harv. L. Rev. 1193 (1943) 19

58th and 65th Annual Reports of the Interstate Commerce Commission 6

63rd, 64th and 65th Annual Reports of the Interstate Commerce Commission 21

Statutes

	PAGE
Bankruptcy Act, §24c (11 U.S.C.A. §47)	2
Bankruptcy Act, §77 (11 U.S.C.A. §205)	*
Interstate Commerce Act, §20b (49 U.S.C.A. §20b)	10
Section 1254 of the Judicial Code (28 U.S.C.A. §1254)	2, 30
Section 3 of Public Law 478, approved April 9, 1948 (62 Stat. 167; 11 U.S.C.A. §208)	*

Abbreviations Used in This Brief

Alleghany:	Alleghany Corporation. (Cause No. 525)
Commission:	Interstate Commerce Commission.
Debtor:	Missouri Pacific Railroad Company. (Cause No. 528)
District Court:	District Court of the United States, Eastern Judicial District of Missouri, Eastern Division.
First and Refunding Bonds:	First and Refunding Mortgage 5% Bonds of Missouri Pacific Railroad Company.
Independent Directors:	John V. Farwell, III, et al., a dissident minority of the directors of the Debtor. (Cause No. 527)
International:	International-Great Northern Railroad Company, a subsidiary of New Orleans and a debtor in these proceedings.
Missouri Pacific:	Missouri Pacific Railroad Company, the principal debtor in these proceedings.
New Orleans:	New Orleans, Texas & Mexico Railway Company and its fourteen subsidiaries (other than the International), all debtors in these proceedings.

* References too numerous to list.

Plan:	The Plan of Reorganization contained in the Fifth Supplemental Order of the Commission dated December 29, 1949 (Vol. LII, pp. 28689-28759).
1940 Plan:	Plan of Reorganization set forth in the Supplemental Order of the Commission, dated April 9, 1940 (1941 R. Vol. II, pp. 483-548).
1944 Plan:	The Plan of Reorganization set forth in the Supplemental Order of the Commission, dated October 9, 1944 (1946 R. Vol. II, pp. 783-852).
R.:	The printed record on appeal filed with the Court below in 1951 in Appeals Nos. 14264-14274, inclusive, and certified to the Clerk of this Court as part of the record on Petitions 524-528.
1941 R.:	The record on appeal filed with the Court below in 1941 in Appeals Nos. 12130 to 12136, inclusive, and certified to the Clerk of this Court as part of the record on Petitions 524-528.
1946 R.:	The printed record on appeal filed with the Court below in 1946 in Appeals Nos. 13367 to 13369, inclusive, and 13371 to 13373, inclusive, and certified to the Clerk of this Court as part of the record on Petitions 524-528.
Section 77:	Section 77 of the Bankruptcy Act (11 U.S.C.A. §205).
Section 208:	Section 3 of Public Law 478, approved April 9, 1948 (62 Stat. 167; 11 U.S.C.A. §208; see Appendix C, p. 38, *infra*).
Serial Bonds:	Missouri Pacific Railroad Company 5¼% Secured Serial Gold Bonds.

Serial Committee:	**Missouri Pacific Railroad Company 5¼% Secured Serial Bondholders Committee. (Cause No. 526)**
Serial Trustee:	**Chemical Bank & Trust Company, Trustee for Missouri Pacific Railroad Company 5¼% Secured Serial Gold Bonds. (Cause No. 524)**
System:	**The Missouri Pacific, the New Orleans, the International and the other debtors listed in the last paragraph of Section B of the Plan and the corporations listed in Section C of the Plan (Vol. LII, pp. 28692-93).**
Tr.:	**Transcript of proceedings in the Court below in Appeals Nos. 14256 and 14264-14274, certified to the Clerk of this Court as part of the record on Petitions 524-528.**
Vol. LII:	**Volume LII (pp. 28461-28760) of the printed record in the District Court, which was certified to the Clerk of this Court as part of the record on Petitions 524-528.**

IN THE

Supreme Court of the United States

OCTOBER TERM 1951

Nos. 524, 525, 526, 527 and 528

CHEMICAL BANK & TRUST COMPANY, as Trustee under the Indenture dated as of December 1, 1926 securing Missouri Pacific Secured Serial Bonds; ALLEGHANY CORPORATION; MISSOURI PACIFIC RAILROAD COMPANY 5¼% SECURED SERIAL BONDHOLDERS COMMITTEE; JOHN V. FARWELL, III, *et al.*, Independent Directors of the Missouri Pacific Railroad Company; and MISSOURI PACIFIC RAILROAD COMPANY,

Petitioners,

v.

GROUP OF INSTITUTIONAL INVESTORS HOLDING FIRST AND REFUNDING MORTGAGE 5% BONDS OF MISSOURI PACIFIC RAILROAD COMPANY, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI TO THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT

This brief is filed in opposition to the petitions in the above entitled causes for writs of certiorari to review the judgment of the Court of Appeals for the Eighth Circuit affirming the order of the United States District Court for the Eastern Judicial District of Missouri, Eastern Division, approving the Plan.

Opinions Below

Court of Appeals—*State of Texas* v. *Group of Institutional Investors, et al.*, 191 F. 2d 265 (8th Cir. 1951); (Tr. 14-36).

District Court—*In re Missouri Pacific R. Co.*, 93 F. Supp. 832 (E.D. Mo. 1950); (R. 915-945).

Commission—*Missouri Pacific Railroad Company Reorganization*, 275 I.C.C. 59, 203 (1949); (Vol. LII, pp. 28461-28760).

Jurisdiction

All of the petitioners invoke the jurisdiction of this Court under Section 1254 of the Judicial Code (28 U.S.C.A. §1254). Some of the petitioners also rely on Section 24c of the Bankruptcy Act (11 U.S.C.A. §47; Serial Trustee's Petition, p. 5, Alleghany Petition, p. 3, Debtor's Petition, p. 2). The motion of the Indepeandent Directors contains no citation to any statute or decision which indicates that the jurisdiction of this Court can be invoked by such a motion.

Preliminary Statement

The petitions contain a brief summary of the history of these proceedings. These summary statements serve to emphasize an outstanding fact. On March 31st of this year these proceedings will have been pending for nineteen years. During this long period the creditors in this reorganization have been enjoined from enforcing their claims. Junior creditors holding claims of approximately $120,000,000 in principal amount have received no interest whatever on their claims since the inception of these proceedings. With a single important exception—the New Orleans First Mortgage bondholders—the senior creditors whose claims are dealt with in the Plan have

received interest during these proceedings at an average rate far below the rates of interest to be borne by the new securities allocated to them under the Plan. This situation has prevailed notwithstanding the high level of earnings during the war years, which the petitioners emphasize. Such a situation certainly was not foreseen by this Court when it rendered the first of its important decisions construing Section 77. *Continental Illinois National Bank & Trust Co.* v. *Chicago, Rock Island & Pacific Railway Company*, 294 U. S. 648 (1935). It is inconceivable that Congress should have intended such a result. This long delay ought not to be ignored in considering the arguments which urge this Court to postpone consideration of the petitions or to adopt a construction of Section 208 which would prevent this Court from settling promptly the questions which the petitioners say are of sufficient importance to merit review by this Court. (See Point I, p. 8, *infra*; Independent Directors Pet., pp. 31-32, Debtor's Pet., pp. 2-3, 26-33.)

A. The Petitioners

The petitioners* may be conveniently classified as follows:

(i) Those who object to the treatment of the New Orleans capital stock—the Serial Trustee and the Serial Committee (Causes Nos. 524 and 526);

(ii) Those who object to the treatment of the Missouri Pacific equity—Alleghany and the Debtor, which is controlled by Alleghany through ownership of a large block of common stock (Vol. LII, p. 28480; Causes Nos. 525 and

---

* Other petitions for certiorari in this proceeding were filed by the State of Texas (Cause No. 416) and Morris, *et al.* (Cause No. 415) in November 1951. This Court denied these petitions on January 2 and 28, 1952, respectively.

528). The Independent Directors fall into this group also (Cause No. 527).*

The Plan deals with thirteen classes of creditors.† Representatives of only one of these classes, holders of the Serial Bonds, have filed petitions seeking review of the judgment below (Causes Nos. 415, 524 and 526). The Court below correctly stated: "None of the preceding plans of reorganization received such general measure of acceptance by creditors" (Tr. 18; *In re Missouri Pacific R. Co.*, 50 F. Supp. 936, 943 (E.D. Mo. 1943); *Wright* v. *Group of Institutional Investors*, 163 F. 2d 1022 (8th Cir., 1947)). But as the Court below noted, "It is unlikely that all the other creditors are entirely satisfied with [the Plan] as the claims of only one of the classes, the New Orleans First Mortgage Bonds, are to be satisfied in full in cash or its equivalent. All the rest must submit to substantial adjustments" (Tr. 18). Appendix A, page 33, *infra*, indicates how far short the Plan falls of providing satisfaction of the claims of System creditors in a realistic sense.

B. The questions presented by the petitions

The principal contentions of the petitioners are that

(i) all proceedings for approval of the Plan are suspended by the provisions of Section 208(a)(5) because of the pendency of the proceeding before the Commission under Section 208(a)(1)** (Independent Directors Pet., pp. 9-10 and Motion, pp. 25-32; Debtor's Pet., pp. 26-33).

---

* However, these dissident directors, being a minority, do not speak for the Debtor. Nor do they have any authority under Section 77(p) to represent security holders of any class. As a minority of directors, they have no interest in this reorganization which is entitled to the protection of the courts or the Commission. Section 77(e) required the District Court to hear only "parties in interest".

† Exclusive of holders of Cairo and Thebes Railroad Company 4% First Mortgage Bonds (all of which were acquired by the Trustee on December 1, 1950) and equipment obligations.

** The pertinent provisions of Section 208 are set forth in Appendix C (p. 38, *infra*).

(ii) the findings of the Commission as to earning power, value and capitalization are not supported by the weight of the evidence (Alleghany Pet., pp. 30-38; Serial Trustee Pet., p. 10; Serial Committee Pet., pp. 5-12; Independent Directors Pet., pp. 16-18, 20-23; Debtor's Pet., pp. 13-24, 37-43). Certain of the petitioners assert that the Commission's action in making these findings was abitrary and failed to conform with legal standards. Others assert that the District Court and the Court below were casual in their review of the Commission's findings. However, their petitions reveal only a disagreement with the Commission as to the weight of the evidence.

(iii) the consolidation provided for in the Plan is not authorized by Section 77 (Independent Directors Pet., pp. 10-13; Serial Committee Pet., pp. 18-19).

(iv) the Commission unlawfully limited the capitalization of the New Orleans by physical value factors (Serial Trustee Pet., pp. 6-11).

(v) the Commission failed to comply with the requirements of Section 208(b) in disposing of surplus cash (Independent Directors Pet., pp. 18-20).

(vi) certain provisions of the Plan relating to the election of the first board of directors are unlawful (Independent Directors Pet., pp. 14-16).

This Court, in the *Western Pacific, Milwaukee* and *Denver* cases* supplied important and necessary interpretations of Section 77. At the time of these decisions a large part of the railroad mileage of the United States

---

* *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448 (1943); *Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 318 U. S. 523 (1943); *R.F.C.* v. *Denver & R. G. W. R. Co.*, 328 U. S. 495 (1946).

was in the hands of trustees and receivers. The clarification of Section 77 which the above cited decisions furnished greatly facilitated the return of the properties of the major roads in bankruptcy and receivership to their owners. The Missouri Pacific System is the only important exception.†

Each of the prior plans in this reorganization has been hotly contested by numerous parties. Almost every conceivable objection to those plans was raised. Both the District Court and the Commission have devoted a great deal of thoughtful consideration to the problems of this reorganization. The opinions of the District Court and the reports of the Commission reveal an understanding of and adherence to the requirements of Section 77 and the principles laid down in the above cited decisions of this Court.* The return of the two prior plans to the Commission for reconsideration and revision indicates an anxious desire on the part of the Court below, the District Court and the Commission to protect the private rights of security holders as fully as is consistent with the public interest and to insure that no creditor or stockholder shall

---

† At the end of 1943 the operated steam railroad mileage in receivership and trusteeship was 64,887. At the end of 1950 this mileage had been reduced to 12,223, of which 9,793 miles, or more than 75%, was operated by the Trustee of the debtors comprising the Missouri Pacific System (58th and 65th Annual Reports of the Interstate Commerce Commission—1944, 1951—App. E).

* The two prior opinions of the District Court are reported in 39 F. Supp. 436 (E.D. Mo. 1941) and 64 F. Supp. 64 (E.D. Mo. 1945) [1941 R. 2328; 1946 R. 1080]. The opinion of the District Court returning the 1940 Plan is reported in 50 F. Supp. 936 (E.D. Mo. 1943) [1946 R. pp. 111-124]. The prior reports of the Commission are reported in 239 I.C.C. 7 (1940) and 257 I.C.C. 479 (1944) [1941 R. pp. 295-473; 1946 R. pp. 646-853]. In 1947, prior to the enactment of Section 208, the Court below requested the views of the Commission as to the advisability of returning the 1944 Plan in the light of changed conditions. Following the Commission's recommendation, it returned the plan to the Commission. *Wright v. Group of Institutional Investors*, 163 F. 2d 1022 (8th Cir. 1947) [R. 1].

forfeit anything of value. This record is entirely inconsistent with the charges of arbitrary action by the Commission and casual review by the District Court* and the Court below.

None of the questions presented by the petitioners are comparable in importance with the type of question dealt with in the three decisions of this Court above cited. In large part the questions presented by the petitions have to do with the application of the principles laid down in those decisions to the particular facts of this case. Indeed some of the petitioners by their emphasis on physical values and book values seek indirectly to obtain a modification of the rule which makes earning power the primary test of value. Other questions are presented for the purpose of obtaining another trial of the facts. These are not the type of questions which this Court will consider.

---

* Judge Moore, by whose order the Plan was approved, has had a wide experience in Section 77 reorganizations. In addition to the Missouri Pacific he also supervised administration of the *Frisco* and *Cotton Belt* estates. *In re St. Louis-San Francisco Ry. Co.*, 59 F. Supp. 417 (E. D. Mo. 1945), aff'd *sub nom. Brooks* v. *St. Louis-San Francisco Ry. Co.*, 153 F. 2d 312 (8th Cir., 1946); *In re St. Louis Southwestern Ry. Co.*, 53 F. Supp. 914 (E. D. Mo. 1944), aff'd with modification, *sub nom. St. Louis Southwestern Ry. Co.* v. *Henwood*, 157 F. 2d 337 (8th Cir., 1946) cert. den. 330 U. S. 836 (1949). The *Frisco* plan was confirmed on November 15, 1945 (see *In re St. Louis-San Francisco Ry. Co.*, 68 F. Supp. 921 (E. D. Mo. 1946). In cooperation with the Commission, Judge Moore dismissed the *Cotton Belt* proceedings upon completion of an arrangement with creditors which avoided the need for reorganization. *Moody's Manual of Investments, Railroads*, 1951, p. 886; *St. Louis Southwestern Railway Company Securities*, 267 I.C.C. 392 (1947).

ARGUMENT

POINT I

The contention that proceedings for approval of the Plan are suspended because of the pendency of the Section 208(a)(1) proceeding does not present a question which merits review by this Court.

The Debtor and the Independent Directors assert that all proceedings relating to the Plan in this reorganization are suspended because of the pendency of the Section 208(a)(1) proceeding before the Commission (Debtor's Pet., pp. 26-33; Independent Directors Pet., p. 9; Independent Directors Motion, pp. 25-32).

The Independent Directors have sought to raise the issue by annexing to their petition a motion asking this Court to vacate the judgment below because it was entered after the filing of the Section 208(a)(1) petition (Independent Directors Motion, pp. 25-32). In the alternative their motion requests that consideration of all petitions for certiorari be deferred pending disposition by the Commission of the Section 208(a)(1) proceeding. This motion is apparently intended to avoid the requirements of the certiorari procedure. If the construction of Section 208(a)(5) involves a question which merits the consideration of this Court, it can be dealt with by granting certiorari for the specific purpose of deciding that question.

We contend that the wording and history of Section 208 plainly negatives the contentions of the Debtor and the Independent Directors and that accordingly the entry of the judgment below was not in conflict with Section 208. There is no important question for this Court's consideration.

Section 208(a)(5) provides as follows:

> "(5) each petition filed under the provisions of paragraph (1) or paragraph (3) of this subsection (a) shall be filed with the court before which is pending the plan which is the subject of the petition and such petition shall be referred by the court to the Commission. Upon the filing of such petition with the court all further proceedings for confirmation of the plan shall be suspended pending disposition of the petition by the Commission and certification of its action thereon to the court."

It is evident from the language of the Senate Committee report* on this legislation that the basic purpose of Section 208 is to give the Commission an opportunity to review a plan in the light of changed conditions prior to final confirmation.

The time limitations governing the filing of a petition under Section 208(a)(1) are explicitly tied in with the confirmation procedure of Section 77. Thus Section 208(a)(1) permits the filing of a petition by any party at any time more than 18 months after the Commission's approval of a plan

> "but before any *order confirming the plan* shall have been entered, or, such an *order* having been entered, if an appeal from *said order* is pending on said date in a circuit court of appeals or the matter is pending in the Supreme Court on a petition to review any order of a circuit court of appeals dealing with said *order of confirmation* or the time within which to make such appeal or to file such petition has not expired * * *." (Emphasis supplied.)

Similar language relating to confirmation is contained in Section 208(a)(2) and (3).

---

* The text of Senate Report 897, in so far as pertinent to the argument of this brief, is set forth in Appendix B (p. 34, *infra*).

In the first three paragraphs of Section 208(a) the terms "order confirming", "order of confirmation" and "confirmation" are used seven times and in each instance there can be no doubt that Congress was referring to confirmation or an order of confirmation in the sense in which it is used in Section 77(e). The use of the term "approval" on four occasions and "consummated" on three other occasions in Section 208(a) leaves little room for doubt that Congress was perfectly well aware of the separate and distinct procedures for approval and confirmation laid down in Section 77(e) and of the established terminology employed in railroad reorganizations.

There is no reason for supposing that in using the phrase "proceedings for confirmation of the plan" in Section 208(a)(5), Congress meant anything other than the usual proceedings directly related to confirmation in its strict sense.* Section 208 was enacted as a part of Public Law 478 (approved April 9, 1948) and constituted Section 3 thereof. Section 2 thereof (commonly called the "Mahaffie Act"†) permits a carrier in reorganization under Section 77, with the permission of the District Court, to file a "Mahaffie Act" plan with the Commission. Section 2 provides that "upon granting of such permission, *such proceeding* [under Section 77] *so far as it relates to a plan of reorganization, shall be suspended* • • •." (Emphasis supplied.) Plainly, Congress knew how to phrase a provision which would suspend all proceedings relating to a plan when it so intended. In Section 208 Congress intended only to stay the hand of the court in exercising its function of confirmation. The procedures developed and the language used in Section 208 precisely effect that intention.

---

* Legal terms in a statute are presumed to have been used in their legal sense. 2 *Sutherland, Statutory Construction*, pp. 438-39 (3rd ed., 1943), and cases there cited.

† Interstate Commerce Act, Sec. 20b (49 U.S.C.A. §20b).

The issues sought to be raised in this Court involve *approval* of the Plan, not *confirmation*.* There can be no "collision" between this Court's action in approval proceedings and the Commission's actions under Section 208. If certiorari is granted, it will be to determine an important question of law arising out of the record which was before the Commission when it certified the Plan and the record in the District Court in the proceedings for approval of the Plan. The function of approval is assigned by Section 77(e) to the courts. None of the issues raised in the approval proceedings is or can properly be before the Commission in the Section 208(a)(1) proceedings.

The function of the Commission in the Section 208(a)(1) proceeding is to appraise events which have transpired since its certification of the Plan in order to determine whether reexamination or revision of the Plan is necessary.

If the Commission finds that reexamination and revision are unnecessary, any action taken by this Court on the petitions will be neither "unseemly" nor a "waste of time and energies" of the Court—indeed the progress of the Plan toward consummation will in that event be materially expedited. If the Commission finds that the Plan should be reexamined and revised, it should have the benefit of this Court's determination of any issue which merits review for its guidance in the subsequent Section 208(b) proceeding. For example, each of the

---

* After entry of the approval order, the Plan was submitted to security holders for acceptance or rejection pursuant to Section 77. The Plan was rejected by only three of the 17 classes to which it was submitted, viz., the Missouri Pacific preferred stockholders (Class 2), the holders of the New Orleans publicly-held capital stock (Class 3) and the Serial bondholders (Class 19). Rejection of the Plan by these classes rendered it necessary for the District Court to reexamine the Plan. Confirmation hearings were held in June 1951 and briefs filed. Those proceedings, being "for confirmation", are suspended pending determination of the Section 208 proceeding.

plans heretofore issued in this reorganization has provided for consolidation of the debtors. It is urged that this provision is unlawful. The courts below have held that the Commission has power to authorize a consolidation under Section 77 (R. 937-39; Tr. 21-25). In view of the Commission's repeated findings that such consolidation is in the public interest, there can be no real doubt that any new or modified plan which the Commission may hereafter approve, if the Plan is returned, will provide for consolidation. Thus, if this Court is of the opinion that an important question is presented by this contention (or any of the other contentions of the petitioners), any future deliberations of the Commission and the District Court will be substantially aided, not hindered, by the grant of the writ and prompt determination of the issue.

To us it seems obvious that the Debtor and the Independent Directors are urging a strained construction of the plain language of Section 208 which is inconsistent with the intention of Congress and which would convert that legislation into an instrument to hinder and delay creditors. It is most unlikely that any of the lower Federal courts will adopt such an interpretation of this legislation should the question ever again arise. Thus there is no need for a pronouncement of this Court on the matter. It would also seem prudent to permit the Commission and the lower Federal courts to acquire some experience in the administration of this new law before this Court undertakes to interpret it. Such experience should be of invaluable aid to this Court.

POINT II

The findings of the Commission as to maximum permissible capitalization should not be reviewed by this Court.

This Court will not grant certiorari "merely to review the evidence or inferences drawn from it" (*General Pictures Co.* v. *Electric Co.*, 304 U. S. 175, 178 (1938), *United States* v. *O'Donnell*, 303 U. S. 501, 508 (1938)); nor will it disturb the concurrent findings of the courts below unless they are shown to be "clearly erroneous". *Faulkner* v. *Gibbs*, 338 U. S. 267, 268 (1949), *Williams Co.* v. *Shoe Machinery Corp.*, 316 U. S. 364, 367 (1942), *Allen* v. *Trust Company*, 326 U. S. 630, 636 (1946), Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (1951), pp. 657-59. The "two court" rule operates as well upon consideration of applications for certiorari as in the decision of cases on the merits. Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (1951), pp. 659-661.*

Some of the petitioners pay lip service to the rules which control court review of the findings of the Commission concerning matters which are affected with the public interest (*e.g.*, Alleghany Pet., p. 29, question 1). But upon analysis it will be found that the questions which the petitioners raise as to the findings pertain only to the weight of the evidence. The Missouri Pacific equity interests question the Commission's findings as to maximum permissible capitalization of the System and component debtors. It is asserted that in determining capitalization the Commission gave undue weight to past earnings,

* The Court of Appeals decisions cited on pages 36-37 of the Alleghany Petition are, of course, not in conflict with the "two court" rule.

improperly computed physical values and generally ignored evidence of the improved condition of the System and of the area it serves. These parties emphasize the high earnings of the System since 1941, the substantial increase in physical values and other favorable facts which the record discloses. They overlook the opinions of this Court which suggest caution in the use of statistics which reflect transitory conditions such as war. *Milwaukee* case, 318 U. S. 523, 542-544; *Western Pacific* case, 318 U. S. 448, 506-509. They completely ignore the adverse factors which have affected railroads since 1945, such as the growing losses of rail traffic to competitive forms of transportation and the spiralling cost of labor and materials.

Of necessity the determination of capitalization and earning power requires the weighing of many complex factors. It involves knowledge of the national transportation economy, of traffic sources and potentialities, of the effect of economic developments on railroad traffic and revenues, and of trends in earnings and costs of operation. It involves an attempt to foresee the future. It vitally concerns the public interest. The appraisal of these factors has been entrusted to the Commission and, if legal standards are followed, its findings are given conclusory effect by Congress and this Court. Section 77: *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 468-77 (1943); *Group of Institutional Investors* v. *Chicago, Milwaukee, St. P. & P. R. Co.*, 318 U. S. 523, 538-42 (1943).

The wisdom of committing this determination to an expert administrative agency, equipped to deal with the mass of evidence that inevitably accompanies a railroad reorganization, cannot be doubted. At the time of issuance of the Plan, this proceeding had been pending for over 16 years. The Commission and the District Court had dealt with testimony, exhibits, orders, financial statements

and other pertinent data comprehending thousands of printed pages of record.*

The petitioners invite this Court to review this enormous record and, in effect, "to try the case *de novo.*" Such an invitation is ordinarily declined. *Timken Roller Bearing Co.* v. *U. S.*, 341 U. S. 593, 596-7 (1951). It should be in this case. None of the three principal contentions of the Missouri Pacific equity interests demonstrates error in the Commission's findings.

1. The contention that the Commission, in making its findings as to earning power, relied on a "depression forecast" and ignored war earnings and recent favorable developments.

Alleghany complains that the forecast of earnings made by the Commission was "preponderantly based" on the so-called "normal year" forecast of the Trustee which was "prepared and presented to the Commission in the depth of the world's worst depression". It is argued that the Commission ignored the changes in the fundamental character of the System's traffic, changes in economic conditions, economic improvements in the Southwest and "all the other undisputed evidence in the record as to the present and probable future increased earning capacity of the System" (Alleghany Pet., pp. 14-24, 34-35; see also Independent Directors Pet., pp. 16-18 and Debtor's Pet., pp. 16-24, 37-41). It is claimed that the Commission in 1948

* The printed record before this Court constitutes over 4500 pages of testimony, reports, orders and exhibits. The printed record in the District Court (only a fraction of which is included in the printed record before this Court) immediately prior to the issuance of the Plan consisted of over 28,000 pages of petitions and orders dealing with the administration of the debtors' estates, reports and financial statements of the debtors. The printed record in the District Court is transmitted to, and forms part of the record before, the Commission. Hundreds of additional pages of testimony bearing on developments since 1949 are now under consideration by the Commission in the pending Section 208 (a)(1) proceeding.

merely revised the Trustee's "normal year" forecast to reflect expected increases in citrus and chemical traffic, and in so doing "arbitrarily" reduced Mr. Neff's estimate by over $1,000,000 (Alleghany Pet., pp. 18, 23, 34; Debtor's Pet., pp. 37-38). The Commission has specifically stated that its "determinations of a normal year's earnings for each of the three principal debtors and for the system are not the result of mere additions of prospective earnings from citrous and chemical traffic to the trustee's normal-year forecasts" (Vol. LII, p. 28655). In arriving at its forecast of normal year earnings, the Commission considered the earnings data for the five-year period (1937-1941) immediately preceding the entry of the United States into World War II and the seven-year period (1942-1948) which includes the war years and the three years immediately following the war (Vol. LII, pp. 28541-28542). It also considered extensive testimony and exhibits regarding recent developments in the Southwestern territory, including the chemical and citrus growth, increases in population in the System territory, increases in income payments, wages and salaries and other statistics which tend to indicate that the Southwestern territory has had a greater proportion of growth in business and agricultural activity than the rest of the United States (Vol. LII, pp. 28534-28541, 28655, 28667; Tr. 33-4). The Commission concluded that the average annual volume of traffic and operating revenues in the future will be larger than the average for the five or ten years immediately preceding the war. The Commission commented:

> "However, in that event, the cost of labor and materials will also be on a higher level. So far as recent experience indicates, these costs have represented a considerably greater proportionate increase than have the revenues. The resulting earnings available for interest have not been commensurate with the increased traffic volume. In the

> event of a business depression ('industrial contraction') both operating revenues and costs will doubtless suffer a serious decline but past experience has shown that the traffic volume and revenues will decrease in a greater degree proportionally than will expenses" (Vol. LII, p. 28542).

The District Court, having considered the entire record, found that the Commission's findings and conclusions were supported by the evidence (R. 949, 919).

The charge that the Plan is based on a "depression formula" for earnings is controverted by the record. In 1940 the Commission's estimate of the System's normal year earnings at about $22,000,000 was substantially in excess of actual System earnings during the 1930's. Only in the first two years of that period did System earnings equal or exceed $22,000,000 (1941 R. Vol. II, pp. 331-335; Vol. LII, p. 28542). The Commission's forecast of $25,450,000 exceeds by over $14,000,000 the average annual earnings for the period 1932-1940. It is $10,000,000 in excess of the highest annual earnings in that period. The new capitalization cannot be serviced adequately with income available for interest of $25,450,000. Such earnings will provide nothing for the new common stock, Class B, and will amount to less than 5% on the capitalization represented by the new common stock, Class A.* As the inflation of prices continues, an increasing proportion of earnings will be required for replacement of plant and equipment. Only in periods of relatively high

---

* Under the Plan the total annual charges through the dividend on the new preferred stock will amount to $21,362,252, exclusive of capital expenditures fund and sinking funds (R. 28638). Out of the normal year earnings of $25,450,000, there will remain, after payment of the preferred stock dividend, $4,087,252. Sinking fund requirements of the Plan and the need for substantial expenditures for replacements and improvements will prevent the distribution by way of dividends of a large portion, if not all, of this balance of earnings in the normal year.

earnings can the holders of new Class A and Class B common stocks expect to receive dividends. It is plain that the new capitalization was not predicated on earnings of the 1930's.

2. The contention that the Commission failed to accord proper weight to improvements.

Alleghany and the Debtor urge that the vast improvements in System properties, especially the dieselization program, have been accorded insufficient recognition (Alleghany Pet., pp. 13-14, 17-18; Debtor's Pet., pp. 20-22). They emphasize the dollar amount of expenditures for additions and betterments, but fail to show that increased earnings will result.

It is apparent from the Commission reports that the Commission was fully aware of the improvements that had been and were being made in the physical plant of the System and of the economies of operation to be realized therefrom. The Commission found that the probable normal year income determined by it "sufficiently reflects any economies of operation resulting from improvements made to the debtor's properties since 1944" (Vol. LII, pp. 28545, 28542-45, 28555, 28511, 28667).

Prior to the issuance of the Plan in December, 1949, the Commission also had before it the petitions filed, and orders entered, in the District Court in the years 1948 and 1949 reflecting the further progress of the Trustee's program for dieselization and other extensive additions and betterments.

The mere statement of the dollar expenditures for improvements gives this Court no basis for appraising their effect on earning power.* A considerable portion of

* As the Commission has stated, railroad property "must be properly maintained and replacement spending does not necessarily result in increased net earnings. Such expenditures are often required to preserve earnings, particularly in view of competitive conditions" (Vol. LII, p. 28545).

such expenditures is required for necessary replacements to insure effective and safe operation.* Substantial amounts have gone into the extensive program of dieselization. That has been a vital necessity to maintain the competitive position of the System. Spiralling costs of labor and materials have added millions of dollars to the cost of improvements. A very substantial proportion of the cost of improvements is not reflected in increased earning power. This is clearly an area in which the expert judgment of the Commission is required.

3. The contention that reproduction cost was improperly computed.

Among the elements of value considered by the Commission was reproduction cost (Vol. LII, pp. 23510-13; 28553; 28667-68)**.

Alleghany and the Debtor urge that the Commission should have adopted a multiplier of 227 (or more) in com-

---

* Alleghany specifically refers to "installation of heavier rails, shorter and permanent steel bridges and creosoted ties and bridge material and grade reductions" (Alleghany Pet., p. 14). In the *Denver* case this Court took note of the fact that "Railroads, even in reorganizations, must make additions to take care of public needs or to lower operating costs" (328 U. S., at p. 515).

** Alleghany offers the unique suggestion that (absent a showing that a railroad has had an opportunity through fair rates to earn a proper return) its value for reorganization cannot be fixed at less than its reproduction cost less depreciation. (Alleghany Pet., pp. 38-46). Not a single reorganization case is cited in direct support of this contention. This Court has thoroughly discussed the proper basis for determining reorganization value and has distinguished value for rate making purposes from reorganization value. (*Milwaukee* case, 318 U. S. at pp. 539-40; *Western Pacific* case, 318 U. S. at pp. 482-3.) Even if value for rate making purposes were controlling, Alleghany has failed to demonstrate error. The notion that rates must yield a fair return on reproduction cost has been repudiated by this Court. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 591 (1944); *Federal Power Commission* v. *Pipeline Co.*, 315 U. S. 575 (1942); See also Robert L. Hale "Utility Regulation In The Light Of The Hope Natural Gas Case", 44 Col. L. Rev. 488, 496 (1944); Robert Swaine "A Decade of Railroad Reorganization under Section 77 of the Federal Bankruptcy Act", 56 Harv. L. Rev. 1193, 1196 (1943).

puting reproduction cost (Alleghany Pet., pp. 8-11, 33-34; Debtor's Pet., pp. 41-42). This was the "spot" multiplier for 1946 (Vol. LII, p. 28668), based on the then current actual costs of construction (R. 156-7). The multiplier of 175 used by the Commission is a "period price multiplier", which reflects construction cost trends (Vol. LII, pp. 28510-11, 28668; R. 468-69).

The Commission was of the opinion that the use of a "spot multiplier" is not "proper in determining capitalization" in reorganization (Vol. LII, pp. 28667-68; see also R. 921).*

Alleghany's contention merely indicates a disagreement with the Commission and the Bureau of Valuation as to the weight to be given to current construction costs in determining reorganization value (Tr. 30). This is a field in which the Commission's conclusions are binding. Alleghany has failed to show that, in reaching its conclusions, the Commission has disregarded legal standards.**

In general, the petitioners have emphasized all the favorable factors which may influence earnings, particularly as reflected in the high earnings during and since World War II. In the *Milwaukee* case this Court indicated that war earnings are an unreliable criterion of

---

* This position is quite understandable. As appears from the Alleghany petition (p. 8), the weighted average cost index for the Southwestern area (Region VIII) has equalled 227 in only 4 years in the 35-year period 1915-1949. Indeed the multiplier of 175 used by the Commission has been equalled in only 12 years during that period, four of which were in the inflated 1920s and the remainder of which were in the World War II and the post-war period.

** If there is any substance to the argument (Alleghany Pet., pp. 10-11) that the Commission in *Ex parte 175 (Increased Freight Rates, 1951,* 281 I.C.C. 557 (1951)) has belatedly recognized the inadequacy of its valuation figures, the Commission will have an opportunity to reconsider in the light of changed conditions its valuation of the debtors' properties in the pending Section 208 proceeding. The Bureau of Valuation filed a new valuation report in those proceedings in November, 1951.

earning capacity (318 U. S. at p. 543). In this case, in *Rutland Railroad Company Reorganization*, 267 I.C.C. 153 (1947) and in its Sixth Supplemental Report in the *Florida East Coast Railway Company Reorganization* (decided October 25, 1951), the Commission has properly expressed its doubts that the high earnings in the post-war years are a fair guide to probable future earnings (Vol. LII, pp. 28560, 28534). The Commission, unlike the appellants, recognized the adverse as well as the favorable factors which may influence earnings. The increasing competition from other forms of transportation,† increasing costs of operation and the vulnerability of the System to floods and frosts have been considered by the Commission (Vol. LII, pp. 28560, 28655; 1946 R. Vol. II, p. 712; 1941 R. Vol. III, pp. 807-815, 1101; Vol. IV, pp. 1494-5). These, together with the past performance of the System,* have been weighed against all of the favorable factors to which the petitioners refer.

The record amply supports the Commission's conclusions with respect to the earning capacity and the capitalization of the System and its constituent debtors (Vol. LII, pp. 28501-64, 28656-68; R. 919; Tr. 25-27). The arguments of the petitioners merely indicate disagreement as to the weight to be accorded to certain factors and the conclusions to be drawn from the evidence as a whole (Tr. 30). This is an entirely insufficient reason for this Court to review the findings of the Commission or of the Courts below.

---

† R. 845-47; In its recent Annual Reports, the Commission has stressed the diversion of traffic from rail to competitive forms of transportation (Sixty-Third Annual Report, pp. 3-4; Sixty-Fourth Annual Report, pp. 1-3, 20; Sixty-Fifth Annual Report, pp. 2-4).

* 1941 R. Vol. II, p. 333; Vol. LII, p. 28542: See p. 17, *supra*.

POINT III

In considering the petitions this Court should ignore the evidence as to changed conditions which was submitted to the Commission in the Section 208(a)(1) proceedings and to the District Court in the hearings on confirmation.

Not only do Alleghany and the Debtor invite this Court to review the findings of the Commission and the District Court on the extensive record before this Court—they also ask this Court to test those findings in the light of evidence which was not before the Commission when it certified the Plan or before the District Court in the approval proceedings. Alleghany, the Debtor, the Independent Directors and the Serial Committee rely extensively on evidence introduced at the confirmation hearings (held in June 1951) and at the Commission hearings in the pending Section 208(a)(1) proceeding (Alleghany Pet., pp. 3-29; Independent Directors Pet., pp. 20-23; Debtor's Pet., pp. 24, 39-40, 47-58; Serial Committee Pet., pp. 5, 7, 9, 11). The necessity for this Court to test a plan for changed conditions* in an approval proceeding has been eliminated by the procedures established by Section 208. Indeed it is wrong to ask this Court to appraise such evidence in the absence of any supporting record and without the benefit of the findings of the Commission or the District Court. The futility of attempting to draw any conclusions from these references to evidence introduced at the Section 208 and confirmation hearings may be readily demonstrated:

1. Certain of the petitioners emphasize that reported System earnings available for interest in 1950 were $45,595,589, or approximately $5,000,000

* *Ecker* v. *Western Pacific R. Corp.*, 318 U. S. 448, 506-509 (1943).

in excess of comparable earnings in 1948 (Alleghany Pet., pp. 16, 35; Debtor's Pet., p. 40; Independent Directors Pet., p. 21). At the recent Commission hearings evidence was introduced indicating that reported 1950 earnings contained a large item of non-recurring income attributable to prior years. There was also evidence tending to show that earnings have been declining since 1948.

2. Alleghany emphasizes testimony (introduced at the confirmation hearings) that annual savings in operating expenses of approximately $13,000,000 will result in 1951 from the Trustee's program of dieselization (Alleghany Pet., p. 34). Other evidence introduced at these hearings plainly demonstrated that savings from dieselization effected in the period 1948-1951 are more than offset by increases in wages and the cost of materials in that same period.

3. The Debtor seeks to demonstrate the improved earning power of the System by quoting at length from the testimony of T. C. Davis (Debtor's Pet., Appendix B, pp. 47-58). The figures contained in this testimony were accepted subject to verification. None of the cross-examination of this witness bearing upon his experience and qualifications is printed in the Debtor's petition. This Court does not have the benefit of the Commission's appraisal of this witness' testimony. Such testimony has no place in a petition before this Court.

In offering the foregoing examples we do not seek to demonstrate in this Court that there have been no changes in conditions since 1949. That is an issue now pending for determination before the Commission. The examples are merely offered to show that in the absence of the

record of proceedings in the confirmation and Section 208 proceedings, this Court cannot possibly evaluate and should not consider any part of the evidence introduced in those proceedings which is relied upon by the petitioners. It was the intention of Congress in enacting Section 208(a)(1) that before final confirmation the courts might have the Commission's expert appraisal of changes, facts and developments occurring after certification of the plan. Thereby this Court was to a large extent relieved of the difficult task of weighing the effect of such changes. This Court will not now attempt to pass judgment on the issue of changed conditions which is before the Commission in the Section 208(a)(1) proceeding and before the District Court in the confirmation proceeding.

POINT IV

The contention that the consolidation proposed in the Plan is unlawful does not present an important question. No conflict of decisions is presented.

The Independent Directors and the Serial Committee contend that the Commission lacked power under Section 77 to provide for the consolidation of the debtors into a single reorganized company.

The authorities are perfectly clear that the Commission may provide for such consolidation. *In re Chicago, Rock Island & Pacific Ry. Co.*, 168 F. 2d 587 (7th Cir., 1948), cert. den. *sub nom. Texas* v. *Brown*, 335 U. S. 855 (1948); *In re Florida East Coast Railway Company*, 81 F. Supp. 926 (S. D. Fla. 1949), aff'd *sub nom. Atlantic Coast Line R. Co.* v. *St. Joe Paper Co.*, 179 F. 2d 538 (5th Cir., 1950), cert. den. 339 U. S. 929 (1950); see also *Callaway* v. *Benton*, 336 U. S. 132 (1949); and see Tr. 24 and cases

there cited. No decision cited by the Independent Directors is in conflict with these cases.

The report of a Congressional committee in 1946 (R. 1075-76; Independent Directors Pet., p. 11) criticizing the construction placed on Section 77(f) by the Commission and the courts in this and other proceedings, leads to a conclusion opposite to that drawn by the Independent Directors. The fact that the matter was called to the attention of Congress and that it failed to act on the suggestions of the Congressional committee indicates that Congress is quite satisfied with the interpretation which the Commission and the courts have placed upon Section 77(f). *Keystone Mining Co.* v. *Gray*, 120 F. 2d 1 (3rd Cir., 1941).

No party representing creditors or stockholders (other than the Serial Committee) complains of the consolidation. The Serial Committee represents only a fraction of the Serial Bonds. Neither Morris, *et al.* (Cause No. 415), nor the Serial Trustee (Cause No. 524), both of whom represent the interests of Serial bondholders, seeks to raise the issue. Obviously no question of general importance is presented.

POINT V

The contention that the Commission unlawfully limited the capitalization of the New Orleans by physical value factors does not present an important question.

The Serial Trustee contends that the Commission arbitrarily limited the valuation of the New Orleans by physical factors in disregard of its earnings. This argument is substantially the same as the argument advanced by

Morris, *et al.* in their Petition 415 which has heretofore been considered and denied by this Court. This Court is respectfully referred to Point I of the joint brief of the Group, the General Mortgage Committee and the Convertible Trustee in opposition to Petition 415.

Alleghany and the Debtor contend that the Commission has dealt inconsistently with physical factors of the Missouri Pacific and the New Orleans. They urge that physical values have been permitted to limit capitalization and value in the case of the New Orleans, and have been given insufficient weight in valuing the Missouri Pacific (Alleghany Pet., pp. 46-48; Debtor's Pet., p. 20). As we have shown in Point I of our opposing brief in Cause No. 415, physical values did not operate to limit the value of the New Orleans. With respect to the Missouri Pacific, earning power clearly would not support a capitalization based on reproduction cost.

POINT VI

The contentions concerning the provision of the Plan dealing with the selection of the first Board of Directors present no important question.

The Independent Directors complain of the procedure for designation of the initial Board of Directors of the reorganized company (Independent Directors Pet., pp. 14-16). Much of their statement concerning this subject is mere assertion without reference to the record.

Section U of the Plan permits certain of the mortgage trustees and bondholders' representatives to designate the initial Board of Directors, one-third of whom shall serve for one year, one-third for two years and the remaining one-third for three years. The classification and

tenure of the first Board is determined by the reorganization managers subject to court approval. Seven members of the initial Board must be residents of the territory served by the System, and all must be approved by the District Court (Vol. LII, pp. 28603-12, 28676-79, 28753-54).

Section 77(b)(5) provides that a plan of reorganization "shall provide adequate means for the execution of the plan * * *" which may include any appropriate "provisions not inconsistent with this section." Section U was included in the Plan in recognition of the desirability of insuring "a degree of stability of management in the early years of the reorganized company" (Vol. LII, p. 28611). The Independent Directors cite no authority for their contention that such provision is unlawful. They fail utterly to demonstrate that the fairness of the Plan is in any way affected.

The Commission "has experience in the matter of starting the new companies off when reorganized" (Tr. 35) and the periods of the initial directorships "are very short in the life expectancy of the new company" (Tr. 36). It is clearly in the public interest that the reorganized company shall be assured of a stable management in the period immediately following consummation of the Plan. The determination of how such stability can be insured is a matter for the judgment of the Commission and the District Court. The requirement that all initial Directors must be approved by the District Court constitutes adequate protection against improper selections (Tr. 36).

The Independent Directors have failed to show an abuse of discretion by the Commission or to demonstrate the importance of the question they seek to raise. Nor have they shown that they represent any parties who will be entitled to vote the new common or preferred stock.

A showing that rights personal to a petitioner are injured or in danger of injury is jurisdictional. *Tyler* v. *Judges of the Court of Registration*, 179 U. S. 405, 406-7 (1900); Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* (1951), Sec. 297, 298 and cases therein cited.

POINT VII

The contention that the Commission has made improper use of the cash balances of the debtors presents no important question.

The contentions of the Independent Directors with respect to the use of surplus cash are stated in such general terms that it is difficult to understand what their specific objections to the Plan are. We infer from the statements made at pages 18-20 of their petition that the "new reorganization principle" which they find in Section 208(b) makes it mandatory for the Commission to include in a plan specific provision for the retirement of debt at a discount with surplus cash.

They point to the substantial cash balances of Missouri Pacific and the System at the end of 1948 and imply that all such amounts in excess of "liberal working funds" were available for purchase of debt at a discount (Independent Directors Pet., p. 18).

Section 208(b) does not establish any "new reorganization principle" with respect to the use of surplus cash. The portion of Section 208(b) quoted by the Independent Directors enumerates some of the factors which the Commission is to consider if a plan is returned at the conclusion of a Section 208(a) proceeding. There is not a word in Section 208(b) that requires the Commission to make provision in a plan for retirement of debt at a discount.

The Commission was fully aware of the proceedings in Congress which resulted in this legislation,* and of the changes, facts and developments emphasized in Section 208(b), when its Fourth and Fifth Supplemental Reports were issued. It gave extensive consideration to the debt reduction, including substantial purchases of System debt at a discount, which had been accomplished since the issuance of the 1. 'lan (Vol. LII, pp. 28471-77, 28576). This is reflected in the improved treatment of security holders provided in the Plan. Its discussion of cash reserves and cash requirements of the System (Vol. LII, pp. 28521-26; 28575-80), to which the Independent Directors fail to refer, makes clear the equitable reasons for the allocation of cash to seniors and the necessity of maintaining cash balances for working capital, reserves and Plan requirements. The District Court found that the Plan made proper use of available cash (R. 942; See also Tr. 35).

The argument of the Independent Directors is based on a misapprehension of Section 208(b), of the provisions of the Plan and of the facts in the record. Plainly, no important question is presented.**

---

* Section 208 became law on April 9, 1948, more than twenty months prior to the certification of the Plan. Section A of the Plan permits the Trustee to continue his debt retirement program, including the purchase of System obligations at a discount (Vol. LII, pp. 28689-91).

** Likewise the assertions of Alleghany and the Serial Committee as to increases since December 31, 1947 in the value of investments, in net quick assets, in net worth, and other book values, present no question for this Court to consider. (Alleghany Pet., p. 13; Serial Committee Pet., pp. 5-6, 8-9.) They are not based on facts of record before this Court and no attempt has been made to correlate the claimed increases with earning power. The last paragraph of Section 77(e) deals with the valuation of "property used in railroad operation". Nothing in that paragraph required the Commission to base its valuation of the properties on book values.

CONCLUSION

The petitions should be denied for the reason that they fail to present a conflict of decisions or an important question which should be reviewed by this Court. The motion of the Independent Directors (i) in so far as it requests that the judgment of the Court below be set aside, should be denied because it fails to comply with Section 1254 of the Judicial Code (28 U.S.C.A. §1254) and because the entry of the judgment of the Court below was not enjoined by Section 208(a)(5) and (ii) in so far as it requests postponement of consideration of the petitions, should be denied because no useful purpose would be served thereby and because such a postponement could result in a further long delay of these proceedings.

Respectfully submitted,

CHARLES W. MCCONAUGHY,
MORRIS D. CRAWFORD, JR.,
Attorneys for Group of Institutional Investors Holding First and Refunding Mortgage 5% Bonds of Missouri Pacific Railroad Company.

CADWALADER, WICKERSHAM & TAFT,
14 Wall Street,
New York 5, N. Y.,
Of Counsel.

SANFORD H. E. FREUND,
Attorney for Protective Committee for the Holders of General Mortgage Bonds of Missouri Pacific Railroad Company.

SHEARMAN & STERLING & WRIGHT,
20 Exchange Place,
New York 5, N. Y.,
Of Counsel.

WILLIAM P. PALMER,
PHILIP E. GREGG,
Attorneys for Bankers Trust Company, Successor Trustee under Missouri Pacific Railroad Company Twenty-Year 5½% Convertible Gold Bonds Indenture.

ROOT, BALLANTINE, HARLAN,
BUSHBY & PALMER,
31 Nassau Street,
New York 5, N. Y.,
Of Counsel.

Dated: February 15, 1952.

THIS PAGE BOUND VERTICAL IN BOOK

APPENDIX A

TABLE SHOWING THE EXTENT TO WHICH SYSTEM CLAIMS AND INTERESTS ARE SATISFIED ON THE BASIS OF MARKET VALUES

Class of Existing Securities	Total Claim	Market Value of New Securities and Cash as of March 31, 1951	Unsatisfied Portion of Claim	% Total
First Mortgages	$397,961,789	$352,859,602	$ 45,102,187	11.3
Junior Debt or Equivalent	209,901,769	114,449,339	95,452,430	45.5
Total Debt	607,863,558	467,308,941	140,554,617	23.1
Preferred Stock	163,171,230	10,904,533	152,266,697	93.3
Total Claims prior to Common	$771,034,788	$478,213,474	$292,821,314	38.0

This exhibit is identical with an exhibit annexed to our brief in the Court below. If market values as of a recent date had been used instead of the March 31, 1951 values, the result would not be substantially different.

The total claims are taken from Appendix D, Vol. LII, p. 28637, and have been adjusted to exclude equipment obligations and to reflect acquisitions of securities (not already reflected in Appendix D) by the Trustee after the effective date of the Plan. The market values shown in the second column of figures above are bid prices taken from the Wall Street Journal of April 2, 1951. The figures in this column also include the cash allocated in the Plan. The quotations for the new common stock, Class A, have been used for the new common stock, Class B, because the latter is not traded in the "when-issued" market. The new first mortgage bonds, Series A (or collateral trust notes) issuable to holders of New Orleans first mortgage bonds are included in the second column of figures at 100 because the Plan contemplates that they will sell at par at the time of consummation (Vol. LII, pp. 28711-12).

APPENDIX B

Extracts from Senate Report No. 897 accompanying H. R. 2298, 80th Congress, 2nd Session, 1948:

"EXPLANATION OF BILL BY PARAGRAPHS

* * *

"Section 3, also a Senate amendment, consists of two subsections, the former of which is divided into 5 paragraphs. These will be considered ad seriatim.

"Paragraph 3a (1) provides, in the case of plans of reorganization hereafter approved by the Commission in section 77 proceedings, that 18 months after the Commission has either certified a plan to a court or had disposed of a like petition filed under this paragraph, any party affected may file a petition and as a result it shall be the duty of the Commission to report to the court any changes, facts, or developments which have taken place since the approval of the plan and which make it necessary or expedient for the Commission to examine or revise the plan. It should be emphasized, however, that such a petition cannot be entertained in those cases where an order confirming the plan has been entered, unless an appeal from such an order is pending in the circuit court of appeals, or the matter is pending in the Supreme Court on a petition to review any order of a lower court dealing with the order of confirmation, or the time to make such an appeal or file such a petition has not expired. These same safeguards are also contained in subsequent paragraphs to make certain that orderly court procedures cannot be displaced or interfered with.

"In the opinion of the committee, the need for this type of reexamination and reconsideration is of the greatest importance where bankruptcy proceedings are pending

for many years, as they generally are in most railroad cases. Evidence before the committee confirms the fact that the financial condition of railroads in reorganization proceedings changes considerably in the long periods which elapse from the time the Commission approves a plan until it is finally confirmed. There is no requirement here that the plan be changed or altered; that lies within the discretion of the Commission. But Commission representatives have testified that under existing section 77 procedures, it has no authority to volunteer advice to the court that relevant facts and conditions which affect the fairness or equitability of a reorganization plan have changed. Witnesses representing some railroads and some security holders have testified that this has resulted, in many cases, in the consummation of some reorganizations which have failed to render equity to certain classes of security holders who had no remedy or recourse at law. The committee believes that the law should be clarified and the duty of the Commission made plain. This paragraph, and the succeeding paragraphs of this section, are intended to remedy this lack of liaison between courts and the Commission.

"Paragraph 3a (2) is substantially similar to the paragraph above, but permits the court, instead of the Commission, to receive a petition and give consideration to whether changes, facts, or developments have occurred which make it necessary or expedient for the Commission to reexamine, revise, or reconsider a plan. If the court so finds, it may return the plan to the Commission for such revision. The same safeguards contained in paragraph (1) to prevent improper action in those cases which have achieved a legal status beyond which changes should not be entertained are included in this paragraph.

"Paragraph 3a (3) is a parallel provision to the two preceding paragraphs and merely provides that in certain reorganization cases still pending the Commission must report to the court any changes, facts, or developments which have taken place since December 31, 1939, and which were not provided for in the plan it approved. Again, the safeguards contained in the two preceding paragraphs to prevent disruption of legal proceedings already too far advanced are included in this paragraph.

Paragraph 3a (4) is merely a procedural provision to insure that if a plan is returned to the Commission in accordance with the provisions of section 3 of the bill, all of the proceedings will be governed by subsection (d) of section 77 of the Bankruptcy Act, as amended.

"Paragraph 3a (5) is also a procedural provision to make certain that petitions alleging new facts or developments must be filed with the court and referred to the Commission. Such action apprises the court of the legal action taken under the new law and suspends further action by the court involving confirmation of the old reorganization plan. The court, of course, retains custody of the property and of the case pending action and report by the Commission.

"Subsection (b) of this section provides for a public hearing in the event a plan is returned to the Commission. It spells out the factors that the Commission must evaluate and on which parties will offer evidence in reconsideration of a plan. The Commission, after such hearing and consideration, may modify or refuse to modify the plan. If the former, it certifies the modified plan to the court and proceedings continue on the modified plan under section 77 as they did on the original plan. If the Commission refuses to modify, it also transmits its order and the transcript for court consideration. If the court finds the

Commission's refusal to modify the plan is based on sufficient findings and is supported by the record, the original section 77 proceedings shall continue as if the plan had never been returned to the Commission. If, however, the court does not so find, it shall return the plan to the Commission for further consideration, after which the Commission shall again certify the plan to the court. The entire procedure here is consistent with the authority and dignity of a court considering bankruptcy cases in which equity is required to be done. It places upon the court the authority to determine whether the facts support the Commission's decision and to that degree places a check upon arbitrary and capricious action by administrative bodies. The committee does not intend that the plan shall become a football between the Commission and the courts; it believes that while courts will give due weight to the facts as ascertained by the Commission, the Commission will also respect the judgment of the courts, particularly in view of the fact that in these cases the court has custody of the property and is intimately familiar with the pertinent facts."

APPENDIX C

Section 3 of Public Law 478, Approved April 9, 1948 (62 Stat. 167; 11 U.S.C.A. §208), referred to in the foregoing brief as "Section 208".

"Sec. 3(a) Notwithstanding any other provision of law—

"(1) with respect to any plan of reorganization or modified plan of reorganization approved by the Interstate Commerce Commission under the provisions of section 77 of the Bankruptcy Act, as amended, subsequent to the effective date of this Act, it shall be the duty of the Commission, upon petition of any party to the proceeding filed at any time more than eighteen months after certification by the Commission to the court of the plan or of an order disposing of a like petition, but before any order confirming the plan shall have been entered, or, such an order having been entered, if an appeal from said order is pending on said date in a circuit court of appeals or the matter is pending in the Supreme Court on a petition to review any order of a circuit court of appeals dealing with said order of confirmation or the time within which to make such appeal or to file such petition has not expired, to report to the court in which consideration of such plan is then pending, any changes, facts, or developments which have occurred since the approval of such plan by the Commission, which were not provided for in the plan, and which in the opinion of the Commission make it necessary or expedient for the Commission to reexamine or reconsider and, if necessary, to revise such plan in order to insure that such plan, if consummated and put into effect, shall then, in the opinion of the Commission, be fair and equitable and in the public interest and compatible with the provisions of this section and section 77 of the Bank-

ruptcy Act, as amended. Upon the filing of any such report by the Commission with the court, the court shall remand the plan to the Commission for such reexamination, reconsideration, and possible revision;

"(2) if, with respect to any plan of reorganization or modified plan of reorganization approved by the Commission subsequent to the effective date of this Act, the court before which such plan is then pending, for approval or confirmation, no order of confirmation having been entered, or, such an order having been entered, if an appeal from said order is pending on said date in a circuit court of appeals or the matter is pending in the Supreme Court on a petition to review any order of a circuit court of appeals dealing with said order of confirmation or the time within which to make such appeal or to file such petition has not expired, upon petition of any party to the proceeding and either with or without a hearing, shall find that changes, facts, or developments have occurred since the approval of such plan by the Commission which were not provided for in the plan and which make it necessary or expedient, in the opinion of the court, that the Commission reexamine and reconsider and revise such plan in order to insure that the plan [if] consummated and put into effect shall then, in the opinion of the court and the Commission, be fair and equitable and in the public interest and compatible with the provisions of this section, and section 77 of the Bankruptcy Act, as amended, the court shall return the plan to the Commission for such reexamination, reconsideration and possible revision;

"(3) with respect to any plan of reorganization or modified plan of reorganization which, on the date of enactment of this Act, is before any district court for approval or confirmation, no order of confirmation having been

entered, or, such order having been entered, if an appeal from said order is pending in a circuit court of appeals or the matter is pending in the Supreme Court on a petition to review any order of a circuit court of appeals dealing with said order of confirmation or the time within which to make such an appeal or to file such petition has not expired, it shall be the duty of the Commission, upon petition of any party to the proceeding, to report to such court any changes, facts, or developments which have occurred since December 31, 1939, which were not provided for in the plan and which, in the opinion of the Commission, make it necessary or expedient for the Commission to reexamine or reconsider and, if necessary, to revise such plan in order to insure that if consummated and put into effect, such plan shall then, in the opinion of the Commission, be fair and equitable and in the public interest and compatible with the provisions of this section and section 77 of the Bankruptcy Act, as amended. Upon the filing of any such report by the Commission with the court, the court shall remand the plan to the Commission for such reexamination, reconsideration, and possible revision;

"(4) in the event of the return of a plan to the Commission pursuant to the provisions of this subsection (a), the proceedings with respect thereto shall be governed by the provisions of subsection (d) of section 77 of the Bankruptcy Act, as amended;

"(5) each petition filed under the provisions of paragraph (1) or paragraph (3) of this subsection (a) shall be filed with the court before which is pending the plan which is the subject of the petition and such petition shall be referred by the court to the Commission. Upon the filing of such petition with the court all further proceedings for confirmation of the plan shall be suspended pend-

ing disposition of the petition by the Commission and certification of its action thereon to the court.

"(b) As to any plan so returned to the Commission by the court, the Commission, upon further hearing at which all parties may appear and submit evidence as to prospective earning power and other relevant facts, and upon consideration of all changes, facts, and developments which have occurred since the date of approval of the plan by the Commission (or which have occurred since December 31, 1939, in the case of plans which on the date of enactment of this Act were pending before, but had not been confirmed by, the court by order which shall have become final), including, without limitation, for such period total railway operating revenues, operating expenses and other charges, net earnings, the full effect of amortization deductions on earnings of past and future years, improvements to property, the effect of released collateral through past or future payments of loans, cash and net current assets, retirements and purchases of debt, including retirements and purchases at a discount that have been made or that can reasonably be made, adjustment and reduction of interest rates on outstanding debt that may be made, shall, in a supplemental report and order, modify, or refuse to modify, any plan which it has approved, stating the reasons for such modification or for its refusal to modify the plan. The Commission, if it modifies the plan, shall certify the modified plan to the court, together with a transcript of the proceeding before it and a copy of its report and order approving the modified plan. Thereafter proceedings upon the plan shall be governed by the provisions of subsection (e) of section 77 of the Bankruptcy Act, as amended, and of this section. If the Commission refuses to modify the plan, it shall

transmit to the court a copy of its report and order, together with a transcript of the proceedings before it. Thereafter, if the court shall find that the refusal of the Commission to modify the plan is based on sufficient findings and is supported by the record, the proceeding upon the plan shall continue as if the plan had not been returned to the Commission; otherwise the court shall return the plan to the Commission for further consideration. Upon such consideration, the Commission shall again certify the plan to the court with such modifications, if any, as it may find necessary, and thereafter further proceedings upon the plan shall be as provided in said subsection (e) and in this section."

End